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No. 77-1788

In the Supreme Court of the United States

SPRING TERM, 1978

SOL GOLDSTEIN, on his own behalf and on behalf of a class similarly situated,

Petitioner,

vs.

FRANCIS JOSEPH COLLIN, a/k/a **FRANK COLLIN**, and all persons acting in concert with him under the name of **The National Socialist Party of America**,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Illinois

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PETITIONER'S REPLY BRIEF ON RESPONDENTS' SUGGESTION OF MOOTNESS

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Introduction

This cause is not moot. Although respondents cancelled their proposed demonstration in Skokie after the instant petition was filed and after petitioner's two emergency motions to Justices of this Court had been filed and denied. respondent Collin immediately stated to the press:

> "[That] does not mean I forego any future demonstration in Skokie," he said. "It means only this one has been cancelled." (*Chicago Tribune*, June 23, 1978, p. 1) (Exhibit 1, App. p. 1)

Thus, respondents in their Brief in Opposition to the Petition herein, can accurately represent:

> *At present*, respondents have no plans to hold an assembly in Skokie, and no permit applications for such an assembly are pending *at this time*. (Brief in Opp., p. 7) (emphasis added).

However, respondents have not abandoned the conduct of which petitioner complains. They have carefully maintained their option to stage a Nazi-style demonstration in a community of holocaust survivors. Although respondents seek to foreclose review here of the summary dismissal without any semblance of established procedure, of the survivors' complaint, that dismissal has a continuing impact upon the petitioner and the class he represents. The judgment below, if it remains extant, leaves the petitioner class with the overhanging threat of a rescheduling of a Nazi-style demonstration, at respondents' sole discretion should "agitation"* again suit their ends, and with a final state holding on record that the First Amendment absolutely bars legal recourse against even tortious aspects of the demonstration. Respondents' qualified cancellation does not render this case moot under the decisions of this Court.

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* Elaborating on his eleventh hour cancellation respondent Collin stated:

> "The whole Skokie issue which began in March, 1977, was pure agitation on our part to force the system to restore our rights to free speech," he said. (Exhibit 1, p. 18, App. 2)

Argument

A voluntary discontinuance of challenged conduct does not *ipso facto* render the challenge moot and nonjusticiable. *Walling* v. *Helmerich & Payne, Inc.*, 323 U.S. 37 (1944); *U.S.* v. *W.T. Grant Company*, 345 U.S. 629 (1952); *Bus Employees* v. *Missouri*, 374 U.S. 74 (1963); *Buffalo Forge Co.* v. *United Steelworkers*, 428 U.S. 397 (1976); and *accord, Carroll* v. *President and Commissioners of Princess Anne*, 393 U.S. 175 (1968). Where the complaining party has an interest which continues to be exposed to the type of harm complained of, unlike *Sosna* v. *Iowa*, 419 U.S. 393 (1975) and *Weinstein* v. *Bradford*, 423 U.S. 147 (1975), the case or controversy continues in effect for jurisdictional purposes.

"The defendant is free to return to his old ways." *U.S.* v. *W.T. Grant Co., supra*, 345 U.S. at 632. *Grant* held a controversy justiciable despite a voluntary cessation and sworn disclaimer of intention to resume an interlocking directorate—something significantly stronger than respondents' bare cancellation of one demonstration. Even a strong disclaimer of the *Grant* type "does not suffice to make a case moot . . . ." *Id.* at 633

The suggestion of mootness in *Walling, supra*, was based on the voluntary relinquishment of a pay plan challenged as an evasion of federal overtime law. The Court stated:

> "Despite respondent's voluntary cessation of the challenged conduct, a controversy between the parties over the legality of the split-day plan still remains. Voluntary discontinuance of an alleged illegal activity does not operate to remove a case from the ambit of judicial power. See Hecht Co. v. Bowles, 321 US 321, 327, 88 L ed 754, 759, 64 S Ct 587; Otis & Co. v. Securities & Exch. Commission (CCA 6th) 106 F (2d) 579, 583,

> 584. Respondent has consistently urged the validity of the split-day plan and would presumably be free to resume the use of this illegal plan were not some effective restraint made. There is thus 'an actual controversy, and adverse interests,' . . . ." 323 U.S. at 43.

On point with *Walling* is the respondents' clear position in this case that they legally can and accordingly might reschedule the complained of demonstration in Skokie.

In *Buffalo Forge, supra,* the Court held a case involving an allegedly unlawful sympathy strike to present "a live controversy despite the J & M employees' return to the job." 428 U.S. 397 at 403, fn. 8. The disputed work stoppage, "though ended, might 'be resumed at any time in the near future at the direction of the International Union, otherwise.'" *Id.* at 403. Given the complaining employer's continuing exposure to the kind of harm at issue, the voluntary cessation did not render the case moot even though at the time of Supreme Court adjudication there were no evident plans for a resumption. Contrary to *Buffalo Forge* and the instant case, the *Weinstein* prisoner had no continuing exposure to the harm he had complained of beyond that faced by any other citizen. (The remaining *Sosna* class members faced continuing prejudice, not merely exposure, under challenged state residency requirement.)

Finally,* in *Carroll, supra,* the Court refused to dismiss as moot a First Amendment challenge to a ten-day restrain-

* Respondents also argue, for the first time, that since petitioner's complaint mentioned only the first date respondents scheduled for their demonstration petitioner has no basis for complaining as to later dates. Aside from the broad scope of equitable jurisdiction, respondents' consistent treatment of this action as live despite the date issue estops them from asserting it now, after significant reliance on their original position by the petitioner.

ing order whose operation had long since terminated. The Court's first citation was to *Bus Employees, supra,* a case involving the seizure of a business, stating its holding as follows:

> "[A]lthough the seizure had been terminated, the case was not moot because the labor dispute [which gave rise to the seizure] remains unresolved. There thus exists . . . not merely the speculative possibility of invocation of the [seizure law] in some future labor dispute, but the presence of an existing unresolved dispute which continues . . ." Quoted at 393 U.S. 175 at 178.

Although there was no mention in *Carroll* of any existing plan or intention by the Princess Anne officials to seek another restraining order against the *Carroll* group, the group's continuing activity and the officials' continuing opposition kept the constitutional issue justiciable:

> "The underlying question persists and is agitated by the continuing activities and program of petitioners: whether, by what processes, and to what extent the authorities of the local government may restrict petitioners in their rallies and public meetings." 393 U.S. at 179.

Lastly, because of the existence of the present underlying decision of the Illinois Supreme Court and the short time frame which would exist if respondents once again decided to demonstrate in Skokie, the issues presented here would, in all likelihood, evade judicial review.

Thus, very much alive in the instant case is the question, similar to that in *Carroll,* whether the First Amendment forecloses any and all consideration by a state court of equity of narrow injunctive relief against an admittedly

tortious and irreparable aspect* of a prospective demonstration. The dispute between the neo-Nazis and the holocaust survivors in Skokie has not abated because of respondents' latest unilateral cancellation of a demonstration. Petitioner and his class should not be required to remain in a state of legal and psychological jeopardy subject to a rescheduling of a Nazi-style demonstration in their community, with all the attendant trauma to be expected therefrom. The decisions of this Court do not require such a result.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of Illinois.

Respectfully submitted,

SOL GOLDSTEIN, on his own behalf, and on behalf of a class similarly situated, Petitioner
JEROME H. TORSHEN
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* This case arises on a motion to dismiss, admitting the allegations of the complaint. Respondents have not challenged petitioner's statement that the law of the case is that the admitted allegations, as the trial court held, state a cause of action in tort and for equitable jurisdiction. Respondents claim only that the First Amendment provides them an absolute defense to their proposed conduct.

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APPENDIX

Chicago Tribune

Friday, June 23, 1978

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Exhibit 1

App. 1

Nazis cancel their march in Skokie

By Ronald Koziol
and Ralph Frammolino

THE NEO-Nazis will not march Sunday in Skokie, but they will have a demonstration at 4:30 p.m. Saturday in Chicago's Federal Building Plaza.

Frank Collin, head of the Chicago unit of the National Socialist (Nazi) Party of America, announced cancellation of the Skokie march at a press conference Thursday in Rockwell Hall, the party headquarters at 2519 W. 71st St.

"[That] does not mean I forego any future demonstrations in Skokie," he said. "It means only this one has been canceled."

Members of the Skokie board gathered in the Village Hall to watch a telecast of Collin's press conference, which lasted only a few minutes.

MAYOR ALBERT J. Smith immediately announced that the permit for the Sunday march was revoked "as of this time." Skokie fought a long and costly legal battle to prevent the march, only to lose in the courts. Still, he said he considered Collin's decision a victory.

"The whole purpose of our fight was not to have these people march in Skokie," Smith said. "Yes, this is a victory. . . . It is a triumph for all mankind, the philosophy represented by this group is an affront to fre men of all races and creeds. Their intended demonstration brought mental hardship not only on our residents, but on concerned people everywhere."

After Collin's announcement, sponsors called off a giant counter-demonstration that had been planned for Sunday afternoon on the grounds of Niles Township East High School.

"If the Nazis are not going to bring their despised symbols to Skokie, we do not want to encourage large numbers of people to come to that community," said David Smerling, president of the Jewish United Fund of Metropolitan Chicago and the Jewish Federation of Metropolitan Chicago.

THE PUBLIC AFFAIRS committee of the Jewish United Fund had acted as the umbrella group for 34 Jewish organizations which, along with various other organizations, were cooperating in plans for the counter-demonstration.

"We feel that this is a great victory for decency, morality, and humanity," Smerling said.

Meetings with community groups will start next week on what might be done about a neo-Nazi march planned for July 9 in Marquette Park on the Southwest Side.

A federal judge's go-ahead for that march was the move that prompted Collin to cancel the Skokie demonstration.

Rabbi H. Goren Perelmuter, president of the Chicago Board of Rabbis, said the leadership of the Jewish Council on Urban Affairs is in close touch with the black community. Some blacks have threatened to appear at the Nazi march.

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Nazis call off Skokie march

Continued from page one

July 9 in the park.

"IF CALLS COME for us, we will join them as we did in Selma and in Washington," Rabbi Pereimuter said.

"If the community calls for support to oppose the Nazis, we will be there," said Maynard Wishner, another spokesman for the group.

Herman H. Moses, national commander of the Jewish War Veterans, canceled his organization's plans to take part in weekend counter-demonstrations against the Nazis in Skokie and Chicago.

Gov. Thompson's office announced that plans were canceled to assemble units of the National Guard in Skokie to prevent violence if the Nazis had marched.

Sixty news reporters and cameramen jammed the Nazi Party headquarters for Collin's 6 p.m. press conference. Outside the front door were Rabbi Meir Kahane of the Conference of Jewish Activists and a handful of his followers.

"We expect to see you in Skokie, Collin," Rabbi Kahane shouted a few seconds before the door was closed and Collin began speaking.

Police asked Kahane and his group to move away, and they did.

Collin said the rally Saturday afternoon "is definitely on despite what else I say here today."

"THE WHOLE SKOKIE issue which began in March, 1977, was pure agitation on our part to force the system to restore our rights to free speech," he said.

He said the news media "not once ever reported why we were demonstrating in Skokie."

The neo-Nazis, who had won long legal battles in both state and federal courts to march in Skokie and to wear Nazi uniforms and symbols while there, were granted the right Tuesday by Federal Judge George N. Leighton to march July 9 in Marquette Park without posting a liability bond with the Chicago Park District.

Collin and other spokesmen for the Nazis had said they might call off the Skokie march if granted the right to march in the park. Last year Judge Leighton said the $350,000 bond required by the Chicago Park District was unconstitutional, violating the party's right to free speech and assembly. The district cut the bond to $60,000, which Collin and his followers were unable to put up.

Richard Troy, special counsel for the park district in the Collin case, said he did not know whether the district would appeal Judge Leighton's ruling and seek a delay in the Marquette Park march.

"This case has more facets than the Hope diamond and we are still looking at it," Troy said.

MEANWHILE, A man who described himself as a "free-lance problem solver" was arrested early Thursday after he admitted to police he intended to burn down the neo-Nazi headquarters—the same building where Collin eventually held his press conference.

Police arrested Irving Lewis, 28, of 525 W. Deming Pl., and charged him with possession of explosive materials after he pulled his car behind the headquarters. Lewis told police he had been inspired by the TV documentary "Holocaust."

Police said they found six bottles filled with gasoline in Lewis' car. The bottles were fitted with paper wicks.

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